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NO. 90-396

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1990 TERM

WILLIAM EDGAR HAWKINS,

PETITIONER,

V.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the petition for certiorari states grounds which warrant this Court's review since the petition does not present a substantial federal question and is highly fact specific.

PARTIES

The caption contains the name of all the parties in the court below.

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OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Petitioner's conviction is reported as Hawkins v. State, 565 So.2d 1193 (Ala. Cr. App. 1990), cert. denied, 565 So.2d 1193 (Ala. 1990).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257. The Alabama Supreme Court denied certiorari on June 1, 1990. Thus, Petitioner had until September 1, 1990 to file a petition. Respondents note that Petitioner's original petition was returned for non-compliance with the rules. The corrected brief was not mailed until September 12, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Respondent is satisfied with Petitioner's statement of Constitutional provisions involved.

STATEMENT OF THE CASE

Petitioner (hereinafter Hawkins) was found guilty of a Mobile County, Alabama jury of possession burglar's tools in violation of Ala. Code, §13A-7-8. The trial court sentenced Hawkins to three years in the state penitentiary. The Alabama Court of Criminal Appeals affirmed the conviction and the Alabama Supreme Court denied further review.

In addition to the facts set forth in the appellate court's opinion and in Hawkins' petition, the Respondent offers the following statement of facts pertinent to the issue before the court.

At the pre-trial suppression hearing on January 12, 1989, in Mobile County Circuit Court, Bernard Ryan testified, on behalf of the State, that in October 1986, while he was a special agent with the FBI, he participated in a joint investigation with the Mobile Police Department regarding the interstate

transportation of stolen property by the members of the McKinney gang. (R. 3-4) Ryan's involvement began after receipt, from the St. Louis FBI office, of information of a sting operation and an investigation of members of the McKinney gang on many burglaries across the southern states of the United States, and transportation of the property to southern Illinois and southern Indiana for sale to fences. (R. 4-5)

The FBI office in Mobile received information that Mobile residents, Tommy Lynn House and his wife, Cloyce House, were part of the burglary ring, and were using Western Union and United Parcel Service for transportation of funds and stolen proceeds. (R. 5) The FBI and Mobile Police Department set up a surveillance of House's residence. (R. 6) The first contact with Cloyce House, co-defendant of the Hawkins, occurred on December 4, 1986. (R. 8) Tommy House was arrested on that date, following a stop of his

eastbound vehicle on Interstate 10, for a federal firearms violation. (R. 8) Stolen property from several burglaries in Mobile and other cities were found in the vehicle, as well as burglary tools. (R. 9) Based on the evidence obtained from the vehicle, and other surveillance information, the FBI obtained a search warrant for a firearm believed to be in House's townhouse. (R. 9) The Mobile City Police Department obtained a search warrant for further evidence of burglary and stolen property in his townhouse. (R. 9)

As a result of evidence obtained pursuant to the search warrants of the House townhouse, Cloyce House was charged with possession of stolen property and controlled substances. (R. 10)

The FBI continued its investigation of the McKinney gang. (R. 11) In the course of that investigation, Mr. Ryan testified, more was learned about one member of the group, the Hawkins. (R. 11) Based on information

circulated by the FBI, Mr. Ryan was aware that the Hawkins was a member of the McKinney gang. (R. 13) During a meeting in Natchez, Mississippi, Mr. Ryan saw a picture of the Hawkins, and received more information on the modus operandi of the burglary ring. (R. 13) Mr. Ryan was aware that the Hawkins traveled to Mobile prior to and during 1987, (R. 13) and, that prior to the arrest of Cloyce House, the Hawkins traveled to Mobile to pick up Tommy Lynn House for burglary trips. (R. 14) The Hawkins traveled to Mobile on October 25, 1987, to visit Tommy Lynn House in the county jail, as evidenced by his signing a visitor's form with his complete name and address. (R. 14-15)

In February, 1988, Mr. Ryan received information from two confidential sources that the Hawkins was to travel to Mobile on either February 10th or 11th to meet with Cloyce House (R. 15), and visit with Tommy Lynn House, during a road trip, or burglary trip

[where burglaries are committed by members of the group in several cities]. (R. 16)

Mr. Ryan stated he began monitoring visitors to Tommy Lynn House in the county jail. (R. 16) Upon learning the Hawkins had been to visit him, Mr. Ryan contacted his source and received information that the Hawkins and Cloyce House were planning a burglary trip. (R. 16) Mr. Ryan then contacted other cities and law enforcement agencies to see if burglaries had been committed in the modus operandi of the group. (R. 17) Mr. Ryan further testified that the group uses two or more people to commit their burglaries. (R. 17) When they arrive in a city they check into a hotel in the community next to the city. (R. 17) They normally go to the library to find the names of prominent people in the city, telephone their residences or "case" the residences. (R. 17) Burglaries are usually carried out during holidays or some festive event, such as the Alabama/Auburn

football game, when nobody is at home for a specific period of time. (R. 17)

In the course of carrying out their burglaries, members of the group use police scanners, walkie-talkies, gloves, a circular pick for the circular on-and-off switch key, and key pick decoders. (R. 17-18) A call is placed to a residence from a telephone booth and the telephone is left ringing. One person remains in the booth to monitor the call, while another person enters the residence unlawfully, picks up the telephone and announces he is inside the house. A lookout, either in a car or on foot, communicates by means of walkie-talkie. The burglar removes only jewelry and silverware, or items which contain gold. Identifiable silver and gold items are melted down. Diamonds and gems are removed and sold separately. (R. 18) Countersurveillance methods are used to detect anybody watching or following. If driving, they go slower than average, or turn around at

a shopping center, and check for air surveillance. (R. 18-19)

Mr. Ryan first received information on January 7, 1988, that the Hawkins was planning a trip to Mobile to commit burglaries. (R. 21) On February 8, 1988, he received information that the Hawkins was definitely coming to Mobile on February 12 and 13, the Mardi Gras weekend, to commit burglaries. (R. 21) The source of this information had been known to Mr. Ryan since October 1987. (R. 22) He had verified and corroborated other information received from this source as to the McKinney gang's activities, and found the information was correct. (R. 23)

Subsequent to receiving the information on the Hawkins coming to Mobile, Mr. Ryan began checking Cloyce House's residence at 2723 Clubhouse Road. (R. 24) On the morning of February 12, 1988, he saw an out-of-state Illinois tag on a vehicle parked at the residence, and saw a white male in his forties

walk out of the residence with Cloyce House, get into her car, a '77 Thunderbird, and then drive away. Mr. Ryan identified the Hawkins as the same man he saw leaving the House residence with Cloyce House. (R. 24)

After observing the Hawkins at the House residence, Mr. Ryan contacted Sgt. John Sweatt, of the Mobile City Police Department, and arranged to conduct a fixed surveillance on the house that night. (R. 25) Mr. Ryan learned from his reliable confidential sources that the Hawkins, Cloyce House, and possibly other members of the group, were going to commit burglaries in wealthy residences during the Mardi Gras balls on Friday night, February 12, and on Saturday night. (R. 27)

At approximately 5:30 p.m. on February 12, Mr. Ryan, several FBI agents, and several Mobile City Police Department investigators, set up surveillance in the area of the House residence on Clubhouse Road. (R. 27) At approximately 6:25 p.m., two vehicles left the

House residence: a gray '77 Thunderbird driven by Cloyce House, in which her mother, Martha Martin, was a passenger, and a brown Buick with an out-of-state dealer's tag from Illinois, driven by the Hawkins. (R. 27-28) Members of the surveillance team, including Mr. Ryan, followed the two cars along Dauphin Island Parkway up to the I-10 expressway, to I-65 north. (R. 28) Both cars drove below the speed limit and the speed of the traffic at the time, speeded up occasionally but then slowed down. (R. 29) They drove westbound on Airport Blvd., until they stopped in the parking lot of the Caligula nightclub at approximately 6:45 p.m. (R. 29)

The surveillance team following the cars could not go into the parking lot, which was a deadend, but sent a person in to check. This person reported back that Cloyce House's Thunderbird was parked but unoccupied. (R. 29) Two men were placed to maintain surveillance on the Thunderbird. (R. 29) The

rest of the team attempted to locate the Hawkins's brown Buick, which had been lost sight of momentarily because the team following had to hang back. (R. 29)

The Hawkins's car was spotted, fifteen or twenty minutes later, travelling north on Hillwood Avenue from Wimbledon Drive, being driven by Martha Martin, the only occupant in the car at the time. (R. 30) The surveillance team continued watch on the car which travelled in a circular pattern, was seen at Stein and McGregor, lost, and then relocated at Tuthill Drive and Old Shell. (R. 30) The team lost the car again and did not find it until 9:15 p.m., parked at the House residence on Clubhouse Road. (R. 31) The residence in the neighborhood, where Martha Martin was driving, were wealthy residences and close to the locations where two previous burglaries had been committed, and property from which had been found in the possession of Cloyce House and the Hawkins. (R. 32)

From 9:15 p.m., when Hawkins's car was spotted back at the Cloyce residence, fixed surveillance was maintained on Hawkins's Buick, and surveillance also continued on House's Thunderbird. (R. 32) At 11:45 p.m., approximately five hours after the Thunderbird was parked in the Caligula parking lot, an FBI agent and Mobile City police officer observed a man retrieve an article from the right wheel well of the Thunderbird, enter the Thunderbird, and drive from the parking lot. (R. 32) The vehicle went northbound on University, onto Sunset Drive, west, stopped, then turned back and returned to University Drive with a second occupant on board. (R. 33) The Thunderbird went on University Drive, to University and Airport Boulevard, where Mr. Ryan observed the Hawkins and Cloyce House in the car. (R. 33) The Thunderbird drove through Arby's drive-up, then on to Airport Boulevard, to I-65 southbound to I-10, westbound to Tillman's Corner. (R. 34)

According to the report of the surveillance team, Hawkins exited the interstate, got back on the interstate immediately and returned to Dauphin Island Parkway and towards Clubhouse Road. (R. 35)

At the intersection of Dauphin Island Parkway and Clubhouse Road, the surveillance team noticed a Mobile City Police unit, so they stopped the vehicle and asked the occupants to step out of the car. (R. 35) Mr. Ryan was present when a search of the vehicle revealed an exposed police scanner, turned on, on the front seat of the vehicle. (R. 35) A camouflage night sack, on the floor, contained a circular lock pick, three small hand-held flashlights approximately three inches long, pry bar, pair of tin snips, pair of garden pruners, pair of channel locks, two large flatheaded screwdrivers, small punch, spare batteries, B.B.s, one CO_2 container, two pairs of cotton gloves, two dark colored jumpsuits zipped up in front, and

one ski mask. (R. 35-36) All of the items were seized by the Mobile City Police Department. (R. 36)

On cross-examination, Mr. Ryan testified the vehicle was stopped and Hawkins and Cloyce House were detained because the police had probable cause to say a burglary was committed. (R. 38) This probable cause was based on Mr. Ryan's information from reliable sources which had been corroborated by the surveillance, and on the fact that both defendants travelled to the same location and used the same modus operandi as used by the McKinney gang, and on the fact that one of the two occupants of the car had previously committed a burglary. (R. 39) Mr. Ryan further testified he reasonably believed that a burglary took place in a certain neighborhood, (R. 41) that the Hawkins and Cloyce House had committed a burglary, and were in possession of burglary proceeds and burglary tools, as on prior occasions. (R. 49)

Sgt. John Sweatt, a sergeant in the Criminal Investigation Division of the Mobile Police Department, works in business services unit which is white-collar crime. (R. 51) In October 1986, he became involved in a joint investigation with the FBI of burglaries, stolen property and criminal activities regarding the McKinney gang. (R. 51)

In February 1988, an out-of-town law enforcement agency contacted Sgt. Sweatt regarding a trip the Hawkins was going to make to Mobile. (R. 52) Sgt. Sweatt shared this information with Agent Ryan of the FBI. (R. 53) They agreed to conduct a joint surveillance of the Hawkins. (R. 53) This was carried out on February 12, and later a Thunderbird vehicle, occupied by the Hawkins and Cloyce House, was stopped. (R. 53) The decision to make the stop was a collective decision by Sgt. Sweatt and his supervisor, Lt. Stewart. (R. 54) As a result of the stop and search, BBs and Co_2 cartridges, used in

case there are dogs, or to break out windows to see if an alarm will go off, were found, corroborating the information previously provided to Sgt Sweatt. (R. 54-55) Sgt. Sweatt further testified that there was probable cause to believe the Hawkins and Cloyce House had committed a burglary, which is why the car was stopped and searched without a warrant, and the Hawkins and House were arrested without a warrant. (R. 56) Cloyce House was arrested and charged with numerous cases of receiving stolen property. (R. 60)

On May 26, 1989, the Hawkins's attorney entered into a stipulation with the State that if the case went to a jury trial, the State could present a prima facie case and the jury would return a verdict of guilty. (R. 67) Ms. Cloyce House's attorney, Jim Byrd, stipulated the same for his client. (R. 67) The Court entered a finding of guilty, preserving the right for Hawkins to appeal the legality of the search. (R. 67-68)

SUMMARY OF THE ARGUMENT

No Rule 10 grounds appear to be argued and Hawkins merely asks this Court to correct a perceived error of fact relating to the finding of the basis of probable cause by the lower appellate court. Furthermore, the lower court correctly applied this Court's precedent to the facts of the case.

ARGUMENT

Hawkins claims that the Alabama Court of Criminal Appeals misapplied this Court's precedents concerning probable cause to search a car without a warrant and therefore the court created a "conflict" with this Court's precedents.

Nothing in the petition, and indeed nothing in the record, suggests that this case presents a "special or important" reason for this Court to consume its scarce time reviewing the merits of the case. See Rule 10. Certainly, the petition does not present

any issue of first impression on a point of constitutional law. In fact, the opinion below relies on well settled precedents from this Court. Furthermore, this case is of no significance, as precedent, in the State of Alabama, precisely because it breaks no new ground in search and seizure law and is limited to the facts presented.

Respondents maintain that, at most, the petition merely asks this Court to correct a perceived error in the application of a set of facts, specific solely to Hawkins, to settled precedent. This Court should decline the offer. For example, the lower court relied on Illinois v. Gates, 462 U.S. 213 (1983), for its understanding of probable cause as established by the informant's tip and verified by the officer's observation. Petitioner concedes that Gates is applicable to his case. See Petition for Cert. at 11-12. His contention is merely that the lower court incorrectly applied Gates to the facts.

Clearly, all Hawkins is asking this Court to do is to re-evaluate the facts which the lower court found sufficient to establish probable cause to stop Hawkins' car. This Court should decline the offer. While mere error correction does not have a place in this Court's jurisprudence, traditionally this Court has relegated such function to a very minor role.[1] See, e.g., Pennsylvania v. Bruder, 109 S.Ct. 205, 207-208 (1988); Florida v. Meyers, 466 U.S. 380, 383-386 (1984); Boag v. MacDougall, 454 U.S. 364, 366-369 (1982).

Petitioner asserts that the lower court also misapplied United States v. Ross, 456 U.S. 798 (1982), because Ross had been arrested before the search was conducted and Petitioner had not. Petition for Cert at 13. The holding in Ross is not dependent on whether the defendant was arrested at the time

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[1]Respondents should not be understood as conceding an error which needs correcting; it does not.

of the search; it is dependent on the existence of probable cause at the time the search was conducted. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." United States v. Ross, 456 U.S. at 823-825. Since the object of the search was for items taken in a burglary, the size of which could have been small enough to fit into the searched bag, and since the officers had probable cause to search, the lower court did not misapply Ross to the facts of this case.

Finally, Hawkins asserts that the stop and subsequent search were not justified under Terry v. Ohio, 392 U.S. 1 (1968). Petition for Cert at 13-14. Just last term in Alabama v. White, 110 S.Ct. 2412 (1990), this Court held that a tip, verified by law enforcement officers, can give the officers sufficient grounds to stop a vehicle under Terry. This

is exactly what transpired in this case as is evident from the facts. Thus, the officers were justified under Terry and White to stop the vehicle. Furthermor, since they had probable cause they were justified in searching the bag.

CONCLUSION

This Court should not grant the petition for certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, P. David Bjurberg, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Respondent, hereby certify that on this 16 day of November, 1990, I did serve three copies of the forgoing on the attorneys for the Petitioner, by placing the same in the United States Mail, first class, postage prepaid and addressed as follows:

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